LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
AUG 31 1969
JOHN F. DAVIS, CLERK

Supreme Court of the United States

OCTOBER TERM, 1968

No. 465

IN THE MATTER OF:
LIGHTING CENTER, INC., BANKRUPT

IN RE:
A. M. FAUCETTE, JR., TRUSTEE IN BANKRUPTCY,
PETITIONER,

versus

MRS. RUTH K. VAN DOLSON, RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FOURTH CIRCUIT

PHILIP WITTENBERG,
207 N. Washington Street,
Sumter, South Carolina,
Attorney for Petitioner.

LEVI & WITTENBERG,
Sumter, South Carolina,
of Counsel.

The R. L. Bryan Company, Legal Printers, Columbia, S. C.

INDEX

	Page
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statutes and By-Laws Involved	3
Statement of Case	6
Argument	9
Conclusion	20
Appendix	21

AUTHORITIES

Cases: PAGE

American Metal Products Co., In Re: 276 F. (2d) 701 .. 13
Curtin v. Salmon River Co., 130 Cal. 345, 62 P. 552, 80 AM. St. Rep. 132 19
DeMoulin v. Magnesite Refactories Co., 186 Cal. 128, 199 P. 42 17
Faucette, Trustee v. Van Dolson, 360 F. (2d) 661 8
Fidelity Fire Ins. Co. v. Harby, 156 S. C. 238, 153 S. E. 141 16
Gilbert v. McLeod Infirmary, 219 S. C. 174, 64 S. E. 524 16
Kimbrell Co. v. Mills & Young Co., 100 S. C. 421, 84 S. E. 996 12
Peurifoy v. Loyal, 154 S. C. 267, 151 S. E. 579 .....16, 19
Rose v. Harlee, 69 S. C. 523, 48 S. E. 541 11
Sundlun v. Noank Shipbuilding Co., 135 Conn. 108, 61 A. (2d) 665 19
Webster Loose Leaf Filing Co., In Re, 240 F. 779 (D. C. N. J. 1916) 17
Whitney Frocks, Inc. v. Jaffe, 138 Conn. 428, 85 A. (2d) 242 14

Statutes:

11 U.S.C. Section 46 8
11 U.S.C. Section 47 (c) 2
11 U.S.C. Section 66 8
11 U.S.C. Section 110 (e) 8
28 U.S.C. Section 1254 (i) 2
28 U.S.C. Section 2101 (c) 2
1949 Revised Statutes, Connecticut, Section 7279 ....5, 14
Code of Laws of South Carolina, 1952:
Section 12-102(4) 5
Section 45-151 .....3, 11
Section 45-152 .....3, 12
Section 45-155 .....2, 4, 9, 13
Section 45-156 .....2, 4, 9, 13

Supreme Court of the United States

OCTOBER TERM, 1968

No. ———

IN THE MATTER OF:

LIGHTING CENTER, INC., BANKRUPT

IN RE:

A. M. FAUCETTE, JR., TRUSTEE IN BANKRUPTCY,
PETITIONER,

versus

MRS. RUTH K. VAN DOLSON, RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Trustee in Bankruptcy as Petitioner hereby petitions this Honorable Court to issue a writ of certiorari to review the decision of the United States Court of Appeals for the Fourth Circuit, entered June 6, 1968.

OPINIONS BELOW

The controversy between the parties arising out of a proceeding in Bankruptcy has been before the United States Court of Appeals for the Fourth Circuit on two occasions on appeals by Petitioner, the first resulting in a remand, *Faucette, Trustee v. Van Dolson*, 360 F. (2d) 611, dated May 2, 1966, printed in the Appendix at page 26; and the second not reported to date, opinion printed in the Appendix at page 38.

Upon belief, the Orders of the District Court dated December 18, 1967, and July 6, 1965, are not reported but are printed in the Appendix at pages 34 and 25, respectively. Likewise the Reports of the Referee in Bankruptcy dated June 28, 1967 and June 21, 1962, are not believed reported, but are printed in the Appendix at pages 28 and 23, respectively.

JURISDICTION

The decision sought to be reviewed was filed on June 6, 1968.

The jurisdiction of this Court to review that decision by writ of certiorari is conferred by 11 U.S.C., Section 47 (c) in conjunction with 28 U.S.C., Section 1254 (1) and 28 U.S.C., Section 2101 (c).

QUESTIONS PRESENTED FOR REVIEW

1. Whether in a matter of first impression in South Carolina, the Courts below should be permitted to engraft elements as prerequisites for invalidating a chattel mortgage which are not patently in the language of Sections 45-155 and 45-156, Code of Laws of South Carolina, instead of being required to construe the language literally, as indicated by all available evidence of precedent.

2. Did the Court below so misinterpret and misapply the applicable law of South Carolina relating to the validity of a corporate transaction involving participation therein by interested officers and directors as to constitute a conflict with said applicable State law?

STATUTES AND BY-LAWS INVOLVED

1. With regard to Question 1:

Section 45-151, Code of Laws of S. C., 1952, Vol. 4, p. 864.

45-151. Descriptions in chattel mortgages.

No chattel mortgages, except (a) mortgages or deeds of trust covering the whole or any part of the real or personal property of a public utility company, hydro-electric company, railroad company or manufacturing company, (b) chattel mortgages executed to a production credit association or to the governor of the Farm Credit Administration, or (c) mortgages executed by the State Rural Electrification Authority or by a cooperative organized under or subject to the provisions of the Rural Electric Cooperative Act (chapter 15 of Title 12), shall be valid or good to convey any interest or right whatever to the mortgagee unless the property mortgaged shall be described in writing or typewriting, but not printing, on the face of the mortgage, nor shall any prosecutions lie for selling any property under the lien of such mortgage unless the property mortgaged shall be described in writing or typewriting, but not printing, on the face of such mortgage.

Section 45-152, Code of Laws of S. C., 1952, Vol. 4, pp. 864-865.

45-152. Requisites of mortgages of crops, etc.

No mortgage shall be good and effective to convey to the mortgagee an interest in or create a lien on any crop, truck or fruit of any kind or description, other than that

which shall be planted or grown within one year from the date thereof, nor unless such crop, truck or fruit together with the land whereon the same is or will be planted or grown shall be described therein. But a mortgage which complies with the foregoing provisions hereof, when indexed or recorded as required by law, shall constitute from its filing for record a prior lien on any crop, truck or fruit therein described, whether or not it shall be at that time or thereafter planted or growing, in preference to a subsequent mortgage thereon and to the lien of any judgment or execution issued thereon.

Section 45-155, Code of Laws of S. C., 1952, Vol. 4, p. 866:

Section 45-155, Unlawful to take Mortgage for greater amount than actually lent.

It shall be unlawful for any such lender of money, his agents, employees, or any person in his behalf, to have inserted in his mortgage or bill of sale, as representing the indebtedness of the mortgagor or vendor, an amount in excess of the actual amount of money received by the borrower, except as provided for in 45-153 and 45-154 and recording fees. (Sections 45-153 and 45-154 are not applicable in this case.) (Parenthetical information supplied.)

Section 45-156, Code of Laws of S. C., 1952, Vol. 4, p. 866:

Section 45-156. Certain Mortgages void.

All mortgages or bills of sale given as security for loans in or on which such charges have been made or which on the face shall show an indebtedness greater than the amount actually received by the borrower in violation of Section 45-155 are hereby declared null, void and of no effect.

1949 Rev. S. Conn. 7279 (revised 1958 G. S. Conn. 49-107, and repealed 1961 replaced by Uniform Commercial Code) entitled "Certain Chattel Mortgages void. Penalty":

Any person who shall loan money upon a note secured by a mortgage upon personal property, in which the sum of money loaned is stated to be greater than the amount actually loaned, or in which the rate of interest to be charged is greater than the rate allowed by law to be charged by pawnbrokers, shall be fined not more than fifty dollars or imprisoned not more than three months or both; and the mortgage and note secured thereby shall be void.

2. With regard to Question 2:

Section 12-102(4), Code of Laws of S. C., 1952, Vol. 1, p. 1063.

12-102. Powers of corporations organized under chapter two.

Every corporation chartered under chapter two of this title shall have the following powers, to wit:

(4) To borrow money for the purpose of carrying out the objects of its charter, to make notes, bonds or other evidences of debt and to secure the payment of its obligations by mortgage or deed in trust on all or any of its property and franchises, both real and personal, when so authorized by resolution of its board of directors or managing board.

By-Laws of Lighting Center, Inc.

ARTICLE 1.

The officers of the corporation shall be a President, a Vice-President, a Secretary and a Treasurer. The officers shall serve as directors and shall constitute the Board of Directors.

ARTICLE 6.

. . . The majority of a Board of Directors shall constitute a quorum provided that such majority shall represent 84% of the outstanding stock of the corporation. Special meetings of the Board of Directors may be called by the President upon one days notice but such special meeting may be held at any time with unanimous consent of the directors.

ARTICLE 7.

. . . Eighty-four per cent of the outstanding stock shall constitute a quorum of all meetings of stockholders.

ARTICLE 8.

A majority of the quorum, whether stockholders or directors, may decide any question coming before the meeting. . . .

ARTICLE 9.

• • • •

The credit of the Corporation shall not be pledged nor any purchase be made nor shall any sale of the property of the Corporation be made except upon vote of the Board of Directors accepting merchandise for resale or any properties or moneys of the Corporation of lesser value than Fifty ($50.00) Dollars.

STATEMENT OF THE CASE

The facts material to the consideration of the questions presented and as heretofore found, admitted, stipulated by the attorneys for the parties, or testified to by the Van Dolsons are as follows:

At a corporate meeting held on March 5, 1960, Robert Van Dolson, husband of the Respondent, Ruth K. Van Dolson, purchased the interests of three stockholders in a South Carolina corporation known as The Lighting Center, Inc., which was incorporated on October 28, 1959, and

which was insolvent almost from its beginning. At this time he then held two-thirds of the issued stock and one Meyers held the remaining one-third.

On the same evening immediately subsequent to the purchase of these interests, Van Dolson, Meyers, and the one attorney representing the corporation, Meyers, and Mr. & Mrs. Van Dolson met and conferred as to the operation of the business: Meyers was named President and General Manager; Van Dolson, Secretary and Treasurer, and Mrs. Van Dolson, Vice-President. The By-Laws provided that each officer was a member of the Board of Directors.

At this particular meeting, as reflected by the Minutes, by unanimous vote, the officers "were authorized and empowered to negotiate for the loan of a sum of money from Ruth K. Van Dolson, and . . . to make, execute and deliver to Ruth K. Van Dolson a promissory note and chattel mortgage to secure payment of said note to Ruth K. Van Dolson upon such terms and conditions as said officers and Ruth K. Van Dolson should agree . . ."

The By-Laws provided that corporation credit should not be pledged except upon vote of the Board of Directors, 84% of the stock being necessary to constitute a quorum of the Board to transact business.

Van Dolson, while acting for the corporation, was representing and concerned with the interests of himself, his wife, and both jointly in requiring a chattel mortgage, and had an interest and concern in the outcome.

The note and mortgage at issue were actually executed by Meyers and Van Dolson as officers on March 22, 1960, and backdated to March 5, 1960. The note and chattel mortgage securing same recited and required payment by August 1, 1960 of $10,676.40 with interest at 6% per annum from March 5; and the mortgage was recorded in the office of the Clerk of Court of Sumter County on March 23, 1960,

creating a lien over all present and after acquired tangible personal property of the corporation.

On March 22, 1960, Mr. Van Dolson himself personally drew a check for only $10,000.00 on a checking account he maintained jointly with his wife, and deposited it to the corporation account, from which some existing creditors were paid, many not being paid, and there being no proration. The note and chattel mortgage at issue for $10,676.40 were given to Mrs. Van Dolson to secure this $10,000.00.

On August 2, 1960, Mrs. Van Dolson notified creditors she was foreclosing her mortgage. An Involuntary Petition in Bankruptcy was filed against the corporation, and by agreement of counsel the foreclosure sale was postponed.

Subsequently, the Trustee obtained appraisals of the inventory and based upon average cost appraisal of $14,734.81 and average present forced market value of $10,318.35, the Court approved a sale for $8,000.00, payable to the mortgagee or Trustee, depending upon final determination in this case.

Thereafter, during the course of administration, the Trustee objected to the validity of the chattel mortgage as the basis of a secured claim on several grounds founded on State law and precedent, among them those included in the questions advanced in this Petition. Full hearing by consent and appearance of all parties thereby vesting jurisdiction per 11 U.S.C., Sections 46, 66, and 110 (e) was held thereon by the Referee in Bankruptcy, whose report holding the chattel mortgage valid and allowing Respondent secured status, was affirmed by the District Court. On appeal by the Trustee, the United States Court of Appeals for the Fourth Circuit vacated the Order of the District Court and remanded the cause to the District Court for recommitment to the Referee for the reasons and purposes stated by it (*Faucette, Trustee v. Van Dolson*, No. 10,240, 360 F. (2d) 611, dated May 2, 1966.) Thereafter, the Referee issued

his Order of June 28, 1967, again sustaining the chattel mortgage and the District Court affirmed by its Order of December 18, 1967. This Petition now seeks review and ultimate reversal of the said judgment of the Court of Appeals filed June 6, 1968.

ARGUMENT

Petitioner is informed and believes that as fiduciary for the unsecured creditors whose rights must depend upon the Federal Judiciary in this controversy in bankruptcy, he is entitled for two principal and important reasons to have this Court fully review the judgment below and grant appropriate relief:

I. The interpretation of Secs. 45-155 and 156, Code of Laws of South Carolina, 1952, is a matter of first impression in South Carolina. Without the citation of or reliance upon a single legal precedent by the Court of Appeals, the District Court or the Referee; in fact, contrary to all available evidence of legal precedent as to the probable interpretation of the existing State law; and in direct conflict with the interpretation by Court of Appeals for the Second Circuit of an almost identical Connecticut Statute, the Court of Appeals for the Fourth Circuit has sustained other than a literal construction of a most important and integral part of the South Carolina Statutes regulating the lending of money upon chattel mortgage security. This should therefore require the exercise by this Honorable Court of its power of supervision, review and decision before these extra elements not patently intended by the Legislature of South Carolina are permitted to stand engrafted by the decisions below upon the statutory scheme as binding precedent for the future.

In brief, Sections 45-155 and 156 of the Code of Laws of South Carolina, 1952, invalidate a chattel mortgage which shows on its face (here $10,676.40) an indebtedness greater

than the amount actually received by the borrower (here $10,000.00). On the first appeal the Court of Appeals remanded to be "better advised of the meaning and effect of the pertinent South Carolina law."

The Referee specifically concluded that: "If these Statutes be construed literally, then Mrs. Van Dolson does not have a secured claim." However, without citing any legal basis or precedent; or even explaining away the evidence of precedent advanced by the Trustee, he merely opined that the South Carolina Supreme Court would hold that there must be an intent to violate the Statute before a security instrument contrary to their terms would be held null and void.

The District Court dodged the legal issue and interpretation problem completely by rendering no opinion or citing no authority as to the probable South Carolina law on the subject, and in fact misinterpreting completely the cases cited by the Trustee by stating that "fraud was an element" in those cases although a reading of same shows this to be erroneous. He preferred to discuss good faith and so called scrivener's error or mistake of which there is not one item of evidence in the testimony if it be read.

Then, the Court of Appeals relied upon the familiarity of the District Court, and by inference of the Referee, as to the State Statutes and decisional law, although neither cited any; and asserted in its opinion that "no different interpretation of the laws of South Carolina by her courts is cited to us." All of the foregoing despite, contrary to, and the ignoring of, cogent, competent, and weighty evidence that there would be a literal interpretation by the South Carolina Supreme Court; and that intent, mistake or any other element would not be engrafted upon the language of the Statutes which have been in effect since 1904 and found in the 1962 Code under the same numbers.

The first item of evidence indicating that they would be literally construed can be seen in the case of *Rose v. Harlee,* 69 S. C. 523, 48 S. E. 541, decided in 1904. This decision by the Supreme Court of South Carolina involved a determination of the meaning of Section 45-151, which apparently was passed close in time to the Sections at issue by the Legislature to regulate chattel mortgages executed in the State, and which has been carried through the years as part of a statutory scheme under the same chapter.

In that case, the Plaintiff brought action to recover certain property described, including crops. Among other defenses, the Defendant took the position that the mortgage was void as to the crops because they were described in print and not in writing or typewriting. After an adverse verdict against the Defendant, the trial court granted a new trial on the basis that "It is manifest from a casual inspection of the paper that it does not comply with the terms of the act." The South Carolina Supreme Court agreed, thereby placing a strict literal interpretation on Section 151. It also found the act declaring such mortgage invalid "was passed for the protection of the public." It adopted the language of this Court in *Pullman Palace Car Co. v. Central Transportation Co.,* 171 U. S. 151, 18 Sup. Ct. 808, 43 L. Ed. 114, which said "They (numerous cases) are substantially unanimous in expressing the view that in no way and in no channels, directly or indirectly, will the courts allow an action to be maintained for the recovery of property delivered under an illegal contract where, in order to maintain such recovery, it is necessary to have recourse to that contract." (All Emphasis supplied.)

The foregoing is about as literal an interpretation as could be found. The Court specifically stated that statute was passed for the protection of the public, and that individual action could not defeat the public policy of which the statute is the expression.

The second item of evidence from the South Carolina decisions indicating that literal enforcement is called for here, while not concerning a statute as strongly worded as the one in issue here, but still part of the chattel mortgage scheme, is the case of *Kimbrell Co. v. Mills & Young Co.*, 100 S. C. 421, 84 S. E. 996, decided in 1915, dealing with a Section, now 45-152.

The Court had to determine whether a description of

> "all my crop of cotton, cotton seed, corn, hay, oats, and all other crops of whatever character now planted and to be planted by me during the year 1913"

was sufficient compliance. The Supreme Court adopted the Circuit Judge's Order as its opinion, in which the Order held that the mortgagee must lose, because the mortgage did not meet the requirement of the statute since it **did not describe or mention the lands.** (Emphasis added.)

Certain language of the case at p. 998 would seem to be appropos:

> "... **Unless the express terms of this statute are to be abrogated by judicial legislation,** it must be held that the record of a mortgage of future crops, which neither describes nor mentions the lands upon which the same are to be grown, is not constructive notice to subsequent bona fide purchasers for value without actual notice of such mortgage, and that the same is not good nor effective against such a purchaser. **To hold otherwise would be to disregard the plain language of the enactment,** which declares that 'no mortgage shall be good and effective to convey to the mortgagee any interest in any interest in any crops unless the land whereon said crops are to be raised shall be described or mentioned in said mortgage' ... If it were held that the reference to 'my crops' was sufficient without any description or mention of the lands upon which they were to be grown, **such a holding would manifestly nullify the statutory requirement that the land must be described or at least mentioned,** or otherwise that no such mortgage shall be

'good or effective to convey to the mortgagee any interest in such crops.' The statutory provision does not say that the existence of the land may be inferred; but, on the contrary, the express requirement is that it must be described or mentioned . . . Failing of such description or mention of such lands, **the positive provision of the statute is that no such mortgage shall be good or effective** to convey to the mortgagee any interest in the crops sought to be mortgaged." (Emphasis supplied.)

It is apparent that the Court did not engraft intent, *mens rea*, fraud or any other requirements upon the legislative enactments discussed. It looked only to the plain language of those statutes and did not judicially legislate. Why should Sections 155 and 156 be dealt with any differently? They should not, and neither the Referee, District Judge, nor Court of Appeals has cited any authority for treating them differently. Additionally, the only other cogent authority on the subject is further evidence to buttress the Trustee's position.

Several cases have arisen both in the State of Connecticut and in the Bankruptcy Courts where the then Connecticut Statute set out at page 5 and similar to the one at issue here was considered.

In a case arising out of a bankruptcy the United States Court of Appeals for the Second Circuit, *In Re American Metal Products Co.*, 276 F. (2d) 701, decided in 1960 had the very issue here present to determine under the above Connecticut Statute.

That Court of Appeals decided that the chattel mortgage was invalid in its entirety because of the overstatement of amount actually loaned. After finding the recorded chattel mortgage stated a sum of money to be greater than the amount actually loaned, it also found, after reviewing the Connecticut decisions "that the cases emphasize the policy objective, that the statute (enacted in 1899) was

intended to insure the veracity and reliability of the recording system."

It stated at page 704:

> "The mortgage under consideration violated the plain language and the specific policy of the statute. It operated as a constructive fraud on the recording system. The consequences is illustrated by *Whitney Frocks, Inc. v. Jaffe*, 1951, 138 Conn. 428, 85 A. (2d) 242, where the Supreme Court of Errors affirmed the trial Court's conclusion that the chattel mortgage was invalid in its entirety because only $900.00 had actually been loaned whereas the mortgage securing the loan stated the amount of the loan to be $1,200.00."

Also, at page 704, "Fraudulent motive or *mens rea* is not prerequisite to a finding of violation of the statute under consideration. It is concluded that the mortgage herein violated Section 7279 and is invalid."

And of importance on the question of whether it was valid *pro tanto* for the amount actually advanced as an equitable matter, since there were such Connecticut decisions in the field of real estate mortgages, the Court reasoned and stated at page 705:

> "The analagous legal principals with regard to real estate mortgages are judge-made. That body of law may properly be developed by the judicial applications of equitable doctrines. In the field of chattel mortgages, however, the Connecticut Legislature has spoken clearly by statute. **A Federal Court may not deflect or defeat the force of that enactment by applying an equitable doctrine where the statute does not leave room for interstitial judicial legislation.**" (Emphasis added.)

It reasoned at page 705 that:

> "One who overstates the amount of the loan in a recorded chattel mortgage would lose nothing but the amount of the overstatement, to which he frequently may not be entitled. Were the MATZ doctrine applied, for the statute to operate at all, fraud or intentional

misrepresentation would be engrafted upon the statutes as an added necessary element of proof. The recording system and its intended beneficiaries would lose the statute's protection against inept, uninformed or careless mortgages, honest though they may be. Had the Connecticut Legislature so intended, an appropriate provision would probably have been adopted in 1899 or in the many years that the statute has been operating and the subject of interpretative litigation." (Emphasis supplied.)

It might be mentioned that since the South Carolina Statute was enacted and reenacted subsequent to the Connecticut Statute and decisions, it can only be assumed that the South Carolina Legislature knows and has approved of the interpretation placed thereon.

Now, reading the Statutes at issue in the light of the cited cases, and none being cited by the Referee, District Judge, or Court of Appeals to the contrary, it would appear that the only reasonable conclusion to reach is that the South Carolina Court would literally construe the Statute and declare this chattel mortgage void; and this Court should so hold.

II. The Court of Appeals as well as the District Court and Referee have so erroneously construed and sanctioned the misconstruction of the South Carolina corporation Statutes and State common law principles applicable at the time to transactions between a corporation and its interested officers and directors, as well as having ignored this particular corporation's By-Laws, as to call for an exercise by this Honorable Court of its power of review and supervision in order to prevent inequity and injustice to Petitioner as fiduciary for unsecured creditors of the bankrupt corporation.

As heretofore stated in this Petition, the Court of Appeals originally remanded to be better advised of the meaning and effect of the pertinent South Carolina law.

The undisputed facts as stipulated and found by the Referee are that the corporate By-Laws required 84% of the outstanding stock in order to have a quorum; and that both Meyers owning one-third and Mr. Van Dolson owning two-thirds voted to authorize negotations with Mrs. Van Dolson and to give the note and chattel mortgage.

The Referee also concluded that the South Carolina case law announced the principle that a director who is disqualified by reason of personal interest, as clearly Mr. Van Dolson was, in a matter before a directors' meeting can not be counted for the purpose of making a quorum nor be counted to make up a majority vote to pass a resolution of the Board of Directors, *Peurifoy v. Loyal*, 134 S. C. 267, 151 S. E. 579; *Fidelity Fire Insurance Company v. Harby*, 156 S. C. 238, 153 S. E. 141; *Gilbert v. McLeod Infirmary*, 219 S. C. 174, 64 S. E. (2d) 524.

Clearly, and mathematically if Mr. Van Dolson were not counted because of his interest in the transaction as shown by the testimony, there would be no valid corporate action and the mortgage avoidable by the Trustee.

The Referee seemingly agreed that Mr. Van Dolson would be prohibited by the cited cases from acting for his wife, but still refused to set aside the mortgage without citing any legal authority to sustain his conclusion. He answered the question of the Appellate Court with a question.

Then the District Court in its "advice" to the Court of Appeals erroneously informed that Court that the South Carolina rule in this connection was solely a "good faith test", by misconstruing the very case he cited, as Petitioner respectfully believes. Despite the citation by the Trustee of the cases referred to by the Referee and his indication of the proper rule; and in addition thereto, despite citations of other Federal and State authorities in keeping with South Carolina precedent in similar factual instances, the

Court of Appeals stated in its opinion of June 6, 1968, ". . . the District Judge was thoroughly familiar with . . . decisional law pertinent here. No different interpretation of the laws of South Carolina by her Courts is cited to us."

The following, in addition to the South Carolina cases cited above, are the "different interpretations" which were in fact cited and which would seem to require a legal conclusion different from that rendered:

On the husband and wife feature, in *DeMoulin v. Magnesite Refactories Co.*, 186 Cal. 128, 199 P. 42, that Court stated:

> "The President, one of the two directors present and voting at the meeting, was directly interested in the passage of a resolution authorizing the execution of the mortgage to secure claim due him, which he intended subsequently to convey to his wife. His vote on the resolution, therefore, was of no avail, the resolution was without authorization, and the mortgage executed in pursuance thereof invalid".

Most illustrative of all, and extremely similar to the instant case is: *In Re Webster Loose Leaf Filing Co.*, 240 F. 779 (D. C. N. J. 1916).

The Court said, at page 782:

> "But a more serious question arises regarding the validity of this mortgage: Did a quorum of the directors qualified to act accept on January 12, 1915, the proposition submitted on behalf of Anita L. Pearson, mortgagee, and pass the resolution authorizing the execution of the mortgage for $10,000.00 to her? At the annual meeting of the stockholders, January 12, 1915, Anita L. Pearson, Gerard Roberts, and Bradford Webster were elected directors of the bankrupt company, by the stockholders. Immediately after the close of the meeting of the stockholders on said day, a directors' meeting was held at which only Gerard Roberts and Bradford Webster, two of the three directors were

present. At that meeting a proposition was submitted on behalf of Anita L. Pearson, by Gerard Roberts, one of the three directors of the company, by the terms of which she agreed to loan the company $10,000-.00 on a chattel mortgage on certain property of the corporation. This proposition was accepted by Roberts and Webster, and the following resolution passed by them."

The Court found that so far as the mortgage was concerned, Roberts was so acting for her, that the legal effect of his vote in passing the resolution which authorized the executions of the mortgage, was the same as if she herself had voted it. It then went on to discuss that legal effect. (Emphasis added.)

The authorization in question required the vote of Roberts to pass. At page 785 we find:

"All of the directors constituting a quorum must be qualified to act. If one of the directors whose presence is necessary to constitute a majority of a quorum, is disqualified by reason of his personal interest, any act done by the body is invalid. 10 Cyc. p. 777.; Cook on Corporations (7th Ed.) 713a; *Van Hook v. Somerville Mfg. Co.*, 5 N. J. Ep. 159. The rule rests upon the broad principle that it is the duty of each director in acting for the corporation to do so in the best interest of the corporation. His duty to the corporation is first. It is a duty he can not perform if his own interest is adverse to that of the corporation. So insidious are the promptings of self-interest, and so great is the danger that it will override duty, when brought into conflict with it, that sound policy requires that such contract should not be enforced or regarded. He occupies the position of a judge passing upon his own case. The proposition in behalf of Mrs. Pearson was presented at the meeting on January 12, 1915, by Gerard Roberts, her attorney, in turn voted upon the proposition submitted by himself. The court said in the case of *Van Hook v. Somerville Mfg. Co.*, that

an interested director in such a transaction, voting a mortgage to himself, must be regarded as a stranger. (Citations.)

"So strictly is this principle adhered to that no question is allowed to be raised as to the fairness or unfairness of the contract so entered into. In such cases, the court will not pause to inquire whether a director or trustee has acted fairly or unfairly; being interested in the subject-matter, he may not as a trustee or director deal with himself, and thus be subjected to the temptation to advance his own interests." (Citations.) (Emphasis supplied.)

The Court said later at p. 787:

• • •

"If the mortgage was executed in pursuance of the authority contained in the resolution of January 12, 1915, it is void as a mortgage. Mrs. Pearson herself could not vote upon a proposition in which she was interested, if her vote was necessary to pass the resolution. If she could not vote, neither could her attorney, who represented her in the board. I am constrained therefore to hold that the mortgage in question is void and of no effect. Mrs. Pearson will have to stand with general creditors."

It is interesting to note that the Court cited the case of *Curtin v. Salmon River Co.*, 130 Cal. 345, 62 P. 552. This case is also cited as authority by the South Carolina Supreme Court in *Peurifoy v. Loyal, Supra.*

In *Sundlun v. Noank Shipbuilding Co.*, 135 Conn. 108, 61A. (2d) 665, the Connecticut Court was required to apply a Rhode Island Statute which was a codification of the South Carolina rule, and reached the conclusion that the chattel mortgage was invalid against a receiver because of the participation and vote of the interested director, despite a contemporaneous loan.

It seems apparent from the foregoing authorities that the Courts below have reached a completely erroneous conclusion as to the pertinent law of South Carolina (although

the Referee did point it out) which this Honorable Court should not sanction, and which it should correct.

CONCLUSION

Petitioner respectfully submits that because the rights of his *cestuis* in this Bankruptcy matter depend as to one issue upon a matter of first impression in the interpretation of a State Statute and as to a second issue upon the correction of an erroneous conclusion by the lower Courts as to State legal precedent, he is entitled to have this Honorable Court exercise its power of supervision and review and render a final determination thereon in the establishment of precedent by granting a writ of certiorari to the Court of Appeals for the Fourth Circuit.

Respectfully submitted,

PHILIP WITTENBERG,
207 North Washington Street,
Sumter, South Carolina,
Attorney for Petitioner.

LEVI & WITTENBERG,
Sumter, South Carolina,
Of Counsel.